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IN THE
Supreme Court of the United States

October Term, 1952

No. ~~371~~ 7

GAYNOR NEWS COMPANY, INC.,
Petitioner,
against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF NEWSPAPER AND MAIL DELIVERERS'
UNION OF NEW YORK AND VICINITY, AS AMICUS
CURIAE**

✓ **STEPHEN C. VLADECK and
SYLVAN H. ELIAS**
*Attorneys for Amicus Curiae,
Newspaper and Mail Deliverers'
Union of New York and Vicinity.*

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CASE CITED

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COURT RULE CITED

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STATUTES CITED

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National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. 5, 151, <i>et seq.</i>):	
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Consent to File

This brief *amicus curiae* is filed pursuant to Rule 27 of the Court's rules. The consent of both parties to the filing of this brief has been filed with the Clerk.

**Interest of Newspaper and Mail Deliverers' Union of
New York and Vicinity**

The Newspaper and Mail Deliverers' Union of New York and Vicinity is a labor organization which has had collective bargaining agreements with the petitioner since 1943. The order sought to be enforced herein contains direction to petitioner relating to its collective bargaining relationship with the Union.

Unless the order below is modified in part, the Union will have been deprived of its right to engage freely in bargaining with the petitioner without it having been given an opportunity to present its case with regard to the facts at issue before the National Labor Relations Board. Although the questions presented to the Court in this appeal do not deal directly with enforcement of the Board order as entered below, the Union is an interested party in these proceedings.

Questions Presented

1. Does an employer who grants a retroactive wage increase and vacation payment to employees who are Union members violate Section 8 (a) (3) of the National Labor Relations Act when he withholds such benefits from non-members, in the absence of independent proof that his action was intended to, or did in fact, encourage union membership?

2. Whether, following a charge filed by a single employee alleging that because of his non-membership in the Union he was denied benefits granted union members, the Board may properly issue a complaint alleging that the employer had discriminated against the charging employee and all others similarly situated.

Statement

1. The Facts

The Newspaper and Mail Deliverers' Union of New York and Vicinity, hereinafter called the Union, relates only those facts relevant to its position.

The petitioner and the Union have had collective bargaining agreements covering the delivery department employees for ten years. On January 2nd, 1946, the petitioner

and the Union executed a contract which contained, *inter alia*, a closed shop provision. The original termination date of that contract was October 16th, 1947. It was extended, by supplementary agreement dated August 22nd, 1946, for an additional period of one year to October 16th, 1948.

On October 9th, 1947, the parties entered into a second supplementary agreement relating to retroactivity in the event a new contract was negotiated at the termination of the then existing agreement.

On October 25th, 1948, the parties entered into a new agreement, effective that day, which provided, *inter alia*, for increased wage and vacation benefits.

The contract also provided that all new employees hired by the petitioner were to become members of the Union thirty days following the beginning of their employment. The Union never obtained the authorization, pursuant to a Board conducted election in accordance with the provisions of Sections 9 (e) and 8 (a) (3) of the Taft-Hartley Act, necessary to negotiate a union security provision.

2. The Action of the Board

The Board found, on these facts, that by entering into an agreement with the Union on October 25th, 1948, containing the unauthorized union security provision, the petitioner had interfered with its employees' rights to refrain from union activity in violation of Section 8 (a) (1). The Board found further that the execution of the unauthorized union security agreement resulted in assistance and support to the union in recruiting and maintaining membership in violation of Section 8 (a) (2) of the Act.

The Board order originally deprived the Union of its right to bargain with the employer until it had obtained certification as the collective bargaining agent for the employees. However, when the Union attempted to comply with the order by filing its petition for certification as collective bargaining representative of the employees of the petitioner, the Board refused to hear the petition and schedule an election. The Board instead insisted that there could be no certification of collective bargaining representatives until the petitioner complied with the provisions of the order of the Board. The Board order also required the petitioner to stop performing or giving effect to its contract of October 25th, 1948 and to refrain from executing or enforcing any agreement with the Union which contained a union security clause unless such agreement had been authorized as provided by the Act.

3. The Decision of the Court Below

The Court below, insofar as it is relevant to this brief, modified the Board's order with respect to the requirement that the Union obtain certification of its representative status. The minority below held that it was within the discretion of the Board to require certification of the Union prior to giving effect to any subsequent agreement between the parties.

The Court, however, ordered that the petitioner refrain from "(c) Entering into, renewing, or enforcing any agreement with Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization, which requires its employees to join, or maintain their membership in, such labor organization as a condition of employ-

ment, unless such agreement has been authorized as provided by the National Labor Relations Act, as amended."

The decision is reported at 197 F. 2d 719.

Argument

As previously stated, the order originally entered by the petitioner required the petitioner to refrain from recognizing the Union until the Union had been certified by the Board as representative of its employees. The Board has not sought review of this portion of the order which was set aside by the Court below, one Judge dissenting.

We are therefore only concerned with that part of the determination below which prohibits petitioner from giving effect to the contract of October 25th, 1948 with the Union and from entering into or giving effect to any subsequent agreement with the Union which contains a union security clause unless such agreement has been authorized as provided in the Act.

Section 17 of the agreement of October 25th, 1948 with the Union expressly limited the operation of other sections of that contract to the extent permitted by Federal or State law or regulation and further provided that if any section be rendered inoperative by force of law, the remaining provisions would nevertheless remain in full force and effect.

We submit to the Court that the validity of the separability provision in an identical contract was determined by it in *National Labor Relations Board, Petitioner v. Rockaway News Supply Co. Inc., Respondent* (October Term, 1952, Docket No. 318, decided March 9, 1952), 343 U. S.

, 97 L. Ed. 470, 474, where this Court, through Mr. Justice Jackson, stated:

"The features to which the Board rightly objects not only may be severed but are separated in the contract. The whole contract shows respect for the law and not defiance of it. The parties, who could not foresee how some of the provisions of the statute would be interpreted, proposed to go as far toward union security as they are allowed to go, and this is their right; and they proposed to go no farther, and that is their whole duty. * * *

"The total obliteration of this contract is not in obedience to any command of the statute. It is contrary to common-law contract doctrine. It rests upon no decision of this or any other controlling judicial authority. We see no sound public policy served by it. Realistically, if the formal contract be stricken, the enterprise must go on—labor continues to do its work and is worthy of some hire. The relationship must be governed by some contractual terms. There is no reason apparent why terms should be implied by some outside authority to take the place of legal terms collectively bargained. The employment contract should not be taken out of the hands of the parties themselves merely because they have misunderstood the legal limits of their bargain, where the excess may be severed and separately condemned as it can here."

We submit that the contract referred to by this Court in the *Rockaway News* case, *supra*, was an agreement by the Union entered into collectively with an association of employers known as the "Suburban Wholesalers", of which both Rockaway News Supply Co., Inc. and the petitioner were members at the time of the execution of the disputed contract in October, 1948. In all respects here relevant, the contracts are identical.

Finally, we submit that the alleged invalidity of the agreement of October 25th, 1948, rested solely and completely upon the Union's failure to obtain the necessary consent through the authorized election procedures required at that time.

Those procedures no longer became necessary upon the amendment of the Act by Public Law 189, 82nd Congress, 1st Session (approved October 22nd, 1951). This amendment, commonly known as the Taft-Humphrey bill, completely removed the election requirement which previously had to be satisfied before a Union could enter into a union shop agreement with an employer. All that is now required is that the Union shall have received from the Board a notice of compliance with Sections 9 (f), (g) and (h), unless there has been an election to rescind such authority. The Union is and has been in compliance with Sections 9 (f), (g) and (h) and therefore the agreements now in effect must be considered as valid and binding upon the parties which have entered into them.

CONCLUSION

For the reasons above stated, we respectfully submit that the order entered below be modified to permit the petitioner to give effect to the contract of October 25th, 1948, and to the subsequent agreements between it and the Union.

Respectfully submitted,

STEPHEN C. VLADDECK and

SYLVAN H. ELIAS

*Attorneys for Amicus Curiae,
Newspaper and Mail Deliverers'
Union of New York and Vicinity.*

April, 1953.